Office Supreme Court, U. S.
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Number 308

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1922.

ROBERT T. MEYER, PLAINTIFF IN ERROR,

v.

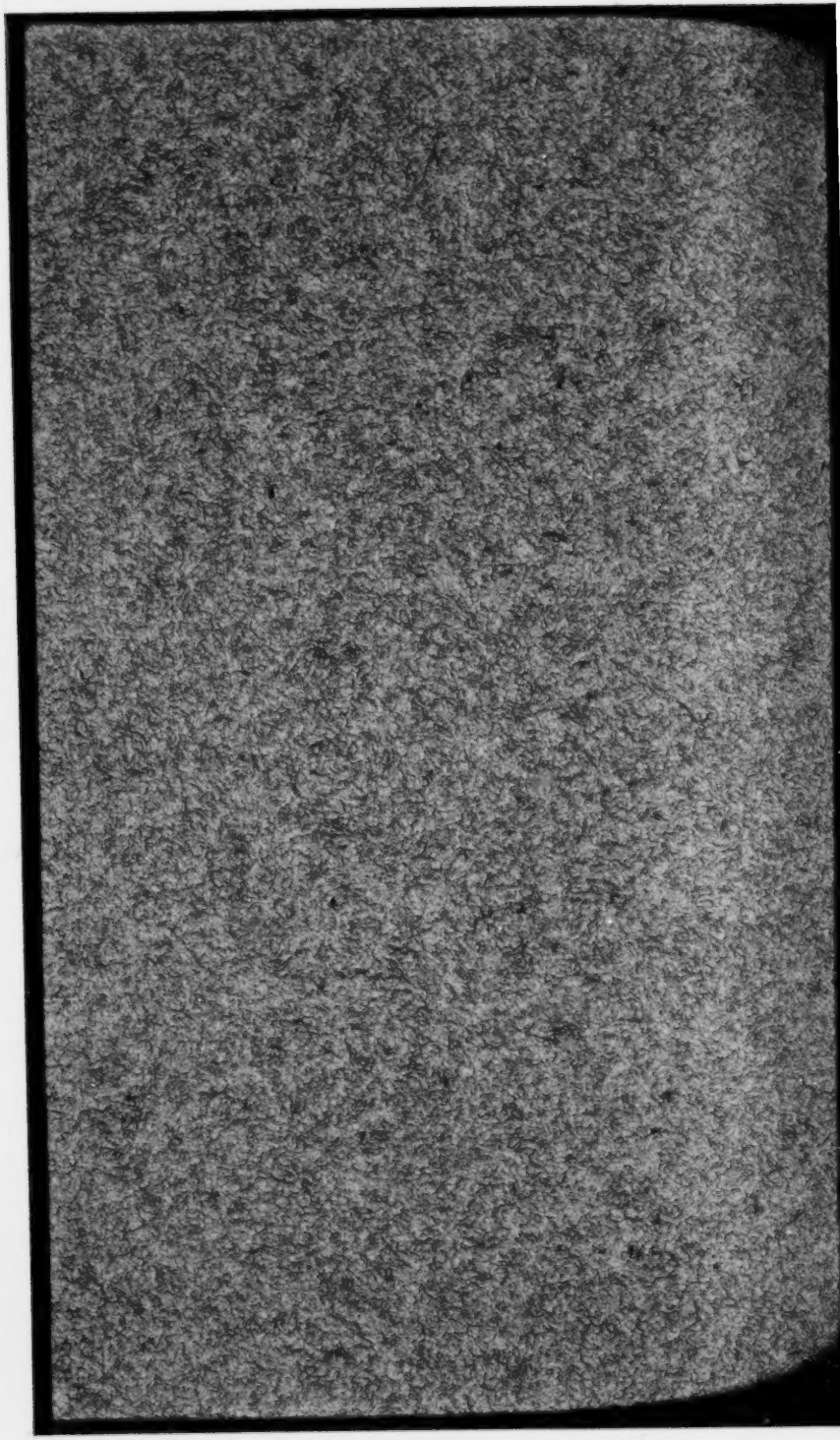
THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

MOTION OF THE STATE OF NEBRASKA, DEFENDANT IN ERROR, TO ADVANCE CASE FOR ARGUMENT UNDER SUBDIVISION 4, RULE 31, SUPREME COURT OF THE UNITED STATES.

CLARENCE A. DAVIS, Attorney General of Nebraska,
Attorney for State of Nebraska, Defendant in Error, Lincoln, Nebraska, for the Motion.

I. L. ALBERT, Columbus, Nebraska,
Attorney for Plaintiff in Error.

WESTERN COMPANY, Law Briefs, Lincoln, Neb.



Number 325.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1922.

ROBERT T. MEYER, PLAINTIFF IN ERROR,

V.

THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

MOTION.

The above named defendant in error, by its attorney, Clarence A. Davis, Attorney General of the State of Nebraska, respectfully moves under Subdivision 3 of Rule 26 of the Supreme Court of the United States, to advance the above entitled case for argument as a criminal case on writ of error to revise a judgment of the Supreme Court of Nebraska, and to permit counsel to file briefs and present their arguments as to the constitutionality of the Nebraska foreign language law before this court finally determines the matter in the Iowa and Ohio cases already argued and now pending.

CLARENCE A. DAVIS,
Attorney General of the State of Nebraska,
Attorney for Defendants in Error.

Lincoln, Nebraska,
December 6, 1922.

Number 325.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1922.

ROBERT T. MEYER, PLAINTIFF IN ERROR,

v.

THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

NOTICE OF SUBMISSION OF MOTION TO ADVANCE CASE FOR ARGUMENT.

You will please take notice that on the printed record herein, the annexed statement of facts verified December 5, 1922, by Mason Wheeler as Assistant Attorney General of the State of Nebraska, there will be submitted to the Supreme Court of the United States without oral argument, on a stated term thereof, on Monday, December 18, 1922, at the Capitol, in the city of Washington, in the District of Columbia, a motion of which the foregoing is a copy.

CLARENCE A. DAVIS,
Attorney General of the State of Nebraska,
Attorney for Defendants in Error.

Lincoln, Nebraska,
December 6, 1922.

To. I. L. Albert, Esq.,
Columbus, Nebraska,
Attorney for Plaintiff in Error.

Service of the above motion with notice thereof together with verified statement of facts is hereby acknowledged this 7th day of December, 1922.

.....
Attorney for Plaintiff in Error.

December 7, 1922.

Number 325.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1922.

ROBERT T. MEYER, PLAINTIFF IN ERROR,

v.

THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

VERIFIED STATEMENT OF FACTS.

United States of America,
State of Nebraska,
County of Lancaster. } ss.

Mason Wheeler, first being duly sworn, deposes and says that he is one of the Assistant Attorneys General of the State of Nebraska, and that he has charge of this case in the office of said Attorney General, and that:

This case is a proceeding by writ of error from a judgment of the Supreme Court of the State of Nebraska sustaining the criminal conviction of the plaintiff in error for violation of the foreign language statute of the State of Nebraska, known as Chapter 249 of the Laws of Nebraska for 1919.

The statute prohibits instruction in foreign languages in schools to children who have not passed the eighth grade. The constitutionality of the statute is attacked in this court on the grounds that it violates the Fourteenth Amendment of the Constitution of the United States; deprives plaintiff in error of his liberty, abridges his privileges and immunities as a

citizen of the United States, and is not a legitimate exercise of the police power. The plaintiff in error was convicted and fined in the District Court of Nebraska in a criminal proceeding upon information for unlawfully teaching reading in a foreign language to a child in the State of Nebraska who had not passed the eighth grade examination. His conviction was sustained in the Supreme Court of the State of Nebraska and the case was thereupon taken to the Supreme Court of the United States by writ of error.

The matter involved is the constitutionality under the United State's Constitution of the foreign language statute of the State of Nebraska, and is substantially the same issue as is pending before this court in another case from Nebraska entitled *Nebraska District of Evangelical Lutheran Synod of Missouri et al.* v. *McKelvie, et al.*, No. 440, October Term, 1922. A motion has been made and is pending before this court to consolidate these cases for purposes of argument.

Appeals involving substantially the same question, the constitutionality of similar foreign language statutes, have already been argued before this court; the constitutionality of the Ohio statute having been submitted to this court on October 12, 1922, in the case entitled *Pohl* v. *State of Ohio,* No. 562, and the constitutionality of the Iowa statute argued before this court on November 29, 1922, in the case entitled *Bartels* v. *Iowa,* No. 445.

This case is of considerable public interest to and in the State of Nebraska; counsel are anxious to submit their briefs and to be heard in argument before this court before the court finally determines the matters involved in the Ohio and Iowa cases. The record and briefs have been printed and filed and the case is now ready for argument.

As this case comes to this court by writ of error from a conviction in a criminal case, it is entitled to advancement under Subdivision 3 of Rule 26 of the Supreme Court of the United States, which rule reads as follows:

> "Criminal cases may be advanced by leave of court on motion of either party."

and is also entitled to preference under Section 1230, United States Compiled Statutes, 1918; Section 253, Judicial Code Revised Statutes; Paragraph 710, 36 Statutes at Large 1160, March 3, 1911, Chapter 231, which reads as follows:

> "Cases on writ of error to revise judgment of state court in any criminal case shall have precedence on the docket of the Supreme Court of all cases to which the Government of the United States is not a party excepting only such cases as the court in its discretion may decide to be of public importance."

Defendant in error prays that this cause, consolidated for purposes of argument with *Nebraska District of Evangelical Luthern Synod* v. *McKelvie*, No. 440, October Term, 1922, be advanced for argument; that it be heard before this court finally determines *Pohl* v. *Ohio*, No. 562, and *Bartels* v. *Iowa*, No. 445, and that it be set down for argument as soon as possible and at any time except during the week of January 8 to 13, 1923, during which week counsel for plaintiff in error in *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie*, has a case on the calendar of the Circuit Court of Appeals.

MASON WHEELER,

Subscribed and sworn to before me this 6th day of December, 1922.

FRIEDA C. BAYERLEIN,
Notary Public.

(Notarial Seal)

Number 325.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1922.

ROBERT T. MEYER, PLAINTIFF IN ERROR,

v.

THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

ORDER.

Upon reading and filing the annexed notice, motion of defendant in error, statement of facts verified December 6, 1922, and the printed record, it is hereby ordered that the case entitled *Robert T. Meyer, plaintiff in error* v. *The State of Nebraska, defendant in error,* No. 325, October Term, 1922, be advanced for argument, and be and is hereby placed on the calendar of this court for argument on the.....day of..... ....., 192.., for the reason that the above entitled case arises on writ of error to reverse the judgment of the Supreme Court of Nebraska in a criminal case.

Washington, D. C., December ....., 1922.

.....

Chief Justice of the Supreme Court of the United States.

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Supreme Court of the United States

October Term, 1922

No. 325

ROBERT T. MEYER,
Plaintiff in Error,

vs.

THE STATE OF NEBRASKA,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This case involves the constitutionality of Chapter 249 of the Laws of Nebraska for 1919 (page 1019), which, omitting the title and emergency clause, is as follows:

"1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.

"2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

"3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and, upon

conviction, shall be subject to a fine of not less than Twenty-five ($25) Dollars, nor more than One Hundred ($100) Dollars or be confined in the county jail for any period not exceeding thirty days for each offense."

An information charging the plaintiff with a violation of that Act was filed in the District Court of Hamilton County, Nebraska, on the 3rd day of September, 1920, which, omitting the formal parts, is as follows:

"That Robert T. Meyer, late of said county, on or about the 25th day of May, A.D. 1920, in the County aforesaid, then and there being, and then and there being a teacher in Zion's Parochial School, a parochial school located and conducted in said County, did then and there unlawfully teach to Raymond Parpart, the subject of reading in a language other than the English language, to-wit, the German language, the said Raymond Parpart being then and there a child of the age of ten years, who had not at said time attained and successfully passed the eighth (8th) grade as evidenced by certificate of graduation issued by the County Superintendent of Hamilton County, Nebraska, the County in which the said Raymond Parpart then and there resided." (page 3, Printed Record.)

The sufficiency of the information to charge an offense was challenged by demurrer *ore tenus,* which, under the practise in the State of Nebraska, was sufficient to raise every question going to the sufficiency of the information to sustain a conviction. The demurrer was overruled. (page 17, Printed Record.)

The testimony begins at page 21 of the printed record. It conclusively establishes that the plaintiff in error, at the time stated in the information, was a teacher in a parochial school maintained by a branch of the Lutheran Church, and that pursuant to the direction of the governing body of the school, he taught reading in a language other than English

during the last half hour of the noon recess, which was from 12 M. to 1:30 P.M., to such of his pupils as desired to receive such instructions, and, that one of the pupils thus taught had not passed the eighth grade.

The jury returned a verdict of guilty (page 10, Printed Record), and from a judgment of conviction rendered thereon (page 12, Printed Record), the plaintiff in error prosecuted an appeal to the Supreme Court of Nebraska.

Among the questions presented and decided on that appeal was, whether the statute was a valid exercise of the police power of the state, and not in contravention of the Fourteenth Amendment to the Constitution of the United States, operating to deprive the plaintiff in error of his liberty and property without due process of law, as an unreasonable restraint upon his liberty and a denial of the equal protection of the law.

Federal Question Decided

The judgment of the lower court was affirmed (page 48, Printed Record), and the constitutionality of the statute sustained by a divided court, in an opinion beginning at page 49 of the printed record. The first headnote to the opinion is as follows:

"The Statute (Laws 1919, ch. 249) prohibiting the teaching of foreign languages in schools of children before they have passed the eighth grade, held, a reasonable exercise of the police power of the state."

In the body of the opinion will be found the following:

"The enactment of such a statute comes reasonably within the police power of the state. * * * It is suggested that the law is an unwarranted restriction, in that it applies

to all citizens of the state and arbitrarily interferes with the rights of citizens who are not of foreign ancestry, and prevents them, without reason, from having their children taught foreign languages in school. * * *

"Whether or not the policy of this law is correct is not for the court to say. That was a question exclusively for the legislature. The question for the court is whether the law is reasonable, and not capricious and arbitrary; whether it was enacted in the interests of the welfare of the state; whether it is a lawful exercise of the police power; in general, whether it is constitutional. If the policy of the law is wrong, the people of the state, through the legislature, or upon their own initiative, can change it." (pages 52 and 53, Printed Record.)

In the dissenting opinion by Mr. Justice Letton, concurred in by Chief Justice Morrissey (page 55, Printed Record), is the following:

"The matter is of grave importance, since it involves the question as to the extent that a legislature may infringe upon the fundamental rights and liberty of a citizen protected by the state and federal constitutions."

A motion for rehearing was filed, which is set out in the printed record, beginning at page 57. The seventh, eighth, ninth and twelfth grounds whereof are as follows:

"7. The court erred in deciding and holding that such statute, as construed by the court in the majority opinion filed herein, does not operate to deprive the plaintiff in error and other persons of their liberty or property without due process of law, nor as an unreasonable restraint upon the liberty of the plaintiff in error and other persons in contravention of the Fourteenth Amendment to the Constitution of the United States or of Section 3, Article I of the Constitution of the State of Nebraska.

"8. The judgment of this court, affirming the judgment of conviction of the plaintiff in error, contravenes the Four-

teenth Amendment to the Constitution of the United States in that it operates to deprive the plaintiff of his liberty and property without due process of law, and as an unreasonable restraint upon his liberty and as a denial of the equal protection of the law.

"9. The said statute is discriminatory in that it unreasonably discriminates between those teaching a foreign language in a parochial or private school and those teaching such languages to pupils privately."

"12. It should more fully appear that the court considered and decided the principal question raised in this case, which is: Does the statute operate to deprive the plaintiff in error of his liberty or property without due process of law, as an unreasonable restraint upon his liberty, or as an unreasonable and unjust discrimination against him, contrary to the Fourteenth Amendment to the Constitution of the United States, and to Section 3, Article I of the Constitution of the State of Nebraska?"

The judgment of the court on that motion appears at page 62 of the printed record, and is as follows:

"This cause came on to be heard upon motion of plaintiff in error for a rehearing herein, in which motion complaint is made that we did not pass upon one of the questions directly involved, namely whether the act upon which the information herein is based and the judgment of conviction rendered thereon contravenes the 14th Amendment to the Constitution of the United States. While the opinion filed does not in express terms refer to that question, yet it seems to us it necessarily disposes of it. We there held that the act in question was a valid exercise of the police power of the state, that is to say, that it does not operate to deprive any person, especially the plaintiff in error, of his liberty or property without due process of law, nor as an unreasonable restraint upon his liberty nor to deny him the equal protection of the law. It is not an unreasonable restraint upon any lawful pursuit nor upon the religious liberty of any person. If it did any of those things, then, as we view it, the judgment of conviction could not be up-

held. Hence, our holding that the statute is a valid exercise of the police power of the state, that the information in this case based thereon charges a crime, and that the judgment of conviction based on such information is affirmed necessarily amounts to a holding that the statute does not contravene the 14th Amendment to the Constitution of the United States. Upon due consideration whereof, it is by the court ordered and adjudged that no probable error appearing in the judgment of this court heretofore entered herein, said motion for rehearing be, and same hereby is, overruled and a rehearing herein denied."

ASSIGNMENT OF ERRORS

First. That the Supreme Court of Nebraska in its decision and judgment erred in affirming the judgment of the court below, for the reason that the statute of the State of Nebraska upon which the prosecution herein is based, being Chapter 249 of the Laws of 1919 of the State of Nebraska, is invalid and unconstitutional and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Second. That the Supreme Court of Nebraska erred in deciding and holding that said Chapter 249 of the Laws of 1919 of the State of Nebraska does not deprive the plaintiff in error of his liberty or property without due process of law, nor operate as an unreasonable restraint on his liberty.

Third. That the Supreme Court of Nebraska erred in deciding and holding that said Chapter 249 of the Laws of 1919 of the State of Nebraska does not abridge the privileges and immunities of citizens of the United States, especially those of the plaintiff in error.

Fourth. The Supreme Court of Nebraska erred in deciding and holding that said Chapter 249 of the Laws of 1919 of the State of Nebraska is valid exercise of the police power of the state.

BRIEF OF ARGUMENT

I.

The right to choose and pursue a given legitimate vocation, is within the rights guaranteed by the 14th amendment.

The plaintiff was not convicted of teaching a forbidden subject in a public school, but of teaching a subject in a foreign language in a private (parochial) school (see information, page 3, Printed Record), and the information is based on a statute making it unlawful to teach in any public, private, denominational or parochial school any subject to any person in any language other than the English language.

The vocation of the plaintiff is teaching—a legitimate vocation— and in teaching, as he did, a certain subject in a language other than English he encroached upon the rights of no other person.

In *Ritchie vs. People,* 155 Ill. 98, it is said:

"The general right of every person to pursue any calling and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment."

As said in *Ex parte Harrison,* 212 Mo. 88:

"Whatever renders the exercise of a right more exclusive or less convenient, or more difficult or less effective impairs such right."

"The liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States of which he cannot, under the 14th Amendment, be deprived by legislation."

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 4 Sup. Ct. R. 652.

That case was cited with approval in:

Hooper v. California, 155 U. S. 662, 15 Sup. Ct. R. 207;
Allgeyer v. Louisiana, 165 U. S. 589, 17 Sup. Ct. R. 427;
Cully v. Baltimore & O. R. R. Co., 1 Hughes 539.

Again:

"A man's business, occupation, profession or calling is his property, and is protected and guaranteed by the Constitution of the United States."

"Mr. Justice Field, in the Slaughter House cases, 16 Wall. 36, 97, in speaking of privileges and immunities, said that they include 'the enjoyment of life and liberty with the right to acquire and possess property of every kind. * * * Clearly among these must be placed the right to pursue a lawful employment in a lawful manner without other restraint than such as equally affects all persons.' "

See also:

Adair v. U. S., 208 U. S. 578;
Munn v. Illinois, 94 U. S. 113;
Taylor v. Beckham, 178 U. S. 548;
Powell v. Pennsylvania, 127 U. S. 678.

Mr. Justice Harlan, in his dissenting opinion filed in *Berea College v. The Commonwealth of Kentucky,* 211 U. S. 45, 29 Sup. Ct. Rep. 33 (39), laid down the following self-evident proposition:

"The capacity to impart instruction to others is given by the Almighty for beneficent purposes; and its use may not be forbidden or interfered with by government,—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property,—especially, where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond

question, part of one's liberty, as guaranteed against hostile state action by the Constitution of the United States. This court has more than once said that the liberty guaranteed by the 14th Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.' "

Citing:

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup Ct. Rep. 427;
Adair v. United States, 208 U. S. 161, 173; 52 L. ed. 436, 442; 28 Sup. Ct. Rep. 277.

Whatever may be said of the conclusion deduced by the author of the foregoing in that case, the truth of the propositions thus advanced will not be questioned.

II.

Imparting knowledge in a foreign language is not inherently immoral cr inimical to the public welfare, and not a legitimate subject for prohibitory legislation.

It will hardly be claimed that because the teaching was in a foreign language, the act was inherently immoral or inimical to the public welfare. In fact, an examination of the statute will show that the legislature did not regard the teaching of a pupil in some language other than English as vicious or inimical to the public welfare. It applies only to schools, leaving teachers and others at liberty to thus teach privately.

It seems to us that the reasoning employed in *State v. Redmond,* 114 N. W. 137 (Wis.), applies here. In that case the validity of a statute providing that whenever an occupant paid for the use of a double lower berth in a sleeping car, he should have the right to direct whether the upper should be opened or closed, unless it was actually used by

some other person who was involved. There the court laid stress on the fact that the statute left it to the occupant of the lower berth to decide whether the upper berth should be put down or left up, holding that allowing such discretion was a confession on the face of the act that it was not considered by the legislature as one deemed to be reasonably vital to the public interest.

The same thought is suggested in *People v. Weiner,* 271 Ill. 74, 110 N. E. 870. There the court dealt with a statute prohibiting the use of second-hand material in making mattresses, quilts or bed comforters, and the sale of such articles thus made. The statute was assailed as unconstitutional. In disposing of the case, the court filed an exhaustive and instructive opinion, in which, among other things, it said:

"The evidence shows that second-hand bedding does not necessarily convey infectious or contagious diseases, and that a lawful business of selling or dealing therein may be carried on without danger to the public health, and the legislature itself recognizes this by permitting persons to remake or renovate or employ others to remake or renovate for their own use any mattress, quilt, or bed comforter, provided the material is sterilized, and it is the fundamental right of every person under the federal and state constitutions to pursue, without let or hindrance, all such callings or pursuit as are innocent in themselves, and not injurious to the public."

In the foregoing, we again find a recognition of the principle that when the legislature by clear implication finds that the practice or pursuit against which the act is leveled does not of itself injuriously affect the public, a measure designed to prohibit it is unconstitutional. It being clear, therefore, both upon reason and legislative finding, that the prohibited acts are not harmful, this measure, insofar as it imposes upon teachers, both lay and clerical,

penalties of fine and imprisonment for the giving of instruction in languages, is violative of their constitutional right to engage in the practice of their chosen profession or calling.

These propositions are in accord with the overwhelming weight of authority if indeed there be any diversity of opinion on the subject. Thus it is said in *Coal Co. v. People,* 17 Ill. 66:

"It has been everywhere held that liberty, as the term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the rights of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare."

In the recent case of *Adams v. Tanner,* 244 U. S. 590, this court, among other things, said:

"Prohibition, not regulation, is what is accomplished by the provisions of the Washington agency law (Wash. Laws 1915, Chap. 1), making it criminal to collect fees from workers for furnishing them with employment or information leading to such employment, although fees may still be collected from those seeking workers.

* * * * *

"A suggestion in behalf of the state that while a pursuit of this kind 'may be beneficial to some particular individuals, or in specific cases, economically it is certainly nonuseful, if not vicious, because it compels the needy and unfortunate to pay for that which they are entitled to without fee or price, that is, the right to work,' while possibly indicative of the purpose held by those who originated the legislation, in reason, gives it no support.

"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly use-

ful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

* * * * *

"In *Allgeyer v. Louisiana,* 165 U. S. 578, 589; 17 S. Ct. 427, 41 U. S. (L. Ed.) 832, we held invalid a statute of Louisiana which undertook to prohibit a citizen from contracting outside the state of insurance on his property lying therein because it violated the liberty guaranteed to him by the Fourteenth Amendment. 'The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.'

" 'If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.' Citing: *Booth v. Illinois,* 184 U. S. 425, 22 S. Ct. 425, 46 U. S. (L. Ed.) 623.

* * * * *

Again:

"'If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail. Citing: *McLean v. Arkansas,* 211 U. S. 539, 547, 548; 29 S. Ct. 206; 53 U. S. (L. Ed.) 315.'

"'The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations, which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted. *Murphy v. California,* 225 U. S. 623, 628; 32 S. Ct. 697; 56 U. S. (L. Ed.) 1229.'

"We are of opinion that Initiative Measure Number 8, as construed by the Supreme Court of Washington, is arbitrary and oppressive, and that it unduly restricts the liberty of appellants, guaranteed by the Fourteenth Amendment, to engage in a useful business. It may not therefore be enforced against them."

III.

The statute, as construed by the Supreme Court of Nebraska, is prohibitive, not regulatory of a legitimate vocation.

The statute prohibits giving instruction to any person in any school, public or private, religious or secular, in any

language other than the English, or teaching a foreign language in any such school to one who has not passed the eighth grade.

That is to say, that this statute, as construed by the Supreme Court of Nebraska, makes it unlawful to impart instruction to any person, in any such school, in the principles of our government, the laws to which they are subject, in matters of faith and morals, or in any department of art or science, in any language other than English, although the pupil may be unable to receive such instruction in that language.

As thus construed, the statute also makes it unlawful to teach a foreign language in any such school to any person, whatever his age, unless he has successfully passed the eighth grade.

IV.

The statute in question is not a legitimate exercise of the police power.

The exercise of the police power can be justified only when it adds, in a substantial way, to the security of the fundamental rights.

That governments are instituted to secure the inalienable rights of men is axiomatic. That government necessarily implies more or less restraint on the exercise of those rights, is readily conceded. But every restrictive measure should carry with it, as compensation, added security of the fundamental rights, otherwise it is antagonistic to the very purpose for which the government was instituted.

That a law requiring that all persons within a certain age should be required to attend the public schools for a

certain period, and, that during such period, they should receive instruction in the language of the country, would be a valid exercise of the police power, calculated to promote the purpose for which the government was instituted, may be conceded. But how a statute which closes the door of knowledge to all who cannot receive instruction in that language, or which stands in the way of their acquiring another language in addition to the language of the country, unless they have been so fortunate as to have successfully passed the eighth grade, adds in any substantial way to the security of the rights the government was instituted to secure, in our opinion, is beyond human ken. In other words, the relation of a law, fixing a minimum of education, to the common good is readily perceived, but how one fixing a maximum—limiting the field of human knowledge—can serve the public welfare or add substantially to the security of life, liberty or the pursuit of happiness is inconceivable.

In *State v. Redmond* (Wis.), 114 N. W. 137, supra, it was, quoting from the syllabus:

"A police regulation is no more legitimate and valid than a law in any other field if it in fact violates any principle entrenched in the constitution.

"It is not every enactment which will to some extent promote health, comfort or convenience that is a legitimate exercise of the police power.

"To constitute a legitimate exercise of the police power, the exigency to be met must so concern the public welfare, and be sufficiently vital thereto as to suggest some reasonable necessity for a remedy affordable only by legislative enactment."

In *Mugler v. Kansas*, 123 U. S. 623, it is said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed

are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution."

The instructive case of *Wyeth v. Board of Health,* 200 Mass. 474, involved legislation prohibiting the burial of the dead except by licensed undertakers, and restricting such licenses to licensed embalmers. It was held that the burial of the dead was so related to the public health and welfare as to be the subject of legislative regulation, but that embalming has no such relation to the public health and cannot be made the subject of statutory regulation.

But no more apt statement of the law is to be found in the books than that of our own Court in *State v. Sperry et al,* 94 Neb. 785, viz.:

"Statutes enacted in the exercise of the police power must not violate rights guaranteed by the constitution. The legislature may not under the guise of protecting public interest arbitrarily interfere with private business."

One claim put forward is, that the statute forwards the work of Americanization. But in our desire for the Americanization of our foreign born population we should not overlook the fact that the spirit of America is liberty and toleration—the disposition to allow each person to live his own life in his own way, unhampered by unreasonable and arbitrary restrictions.

This spirit has often manifested itself in our resentment, and has at times prevented the efforts of tyrannical

governments to suppress minority languages. This is well set forth in the following from the New York Independent:

"One of the chief indictments that we have brought against Germany is the interference with the use of French in Alsace-Lorraine, Danish in Schleswig, and Polish in Posen. Daudet's heart-rending story of 'the last lesson' of the French schools in the conquered provinces has inspired us to fight for their transfer to France so that the people may under this democratic government teach and learn in either French or German. The punishment by the Germans of the little Polish children for reciting their catechism at the public schools in their native tongue aroused deep indignation not only in America, but even in Germany. When the czar prohibited the Lithuanian press, it was America that came to the rescue by printing papers and books in Lithuanian for smuggling into Russia. The apologists for kaiser and czar argued that Poland and Lithuania were disloyal and that the language was used to cultivate the national spirit. This was true, but the American people rightly refused to consider it a justification for the denial of one of the primary rights of humanity.

"When Kossuth came to America to plead for the right of Hungarians to their native tongue he was received with enthusiastic welcome, but when the Hungarians took their turn at tyranny and tried to suppress Rumanian in school and court and church, American sympathy turned against the Hungarians.

In the same spirit Americans have taken an active part in the movements for the cultivation of the Czech, Irish, Ukranian, Hebrew, Finnish, Serbian, Armenian, and other languages threatened with extinction. Some of us have been skeptical of the advantages of multiplying languages, but we were all agreed that it was wrong to interfere with them and we pointed to Switzerland and the United States as examples of the actual benefits of toleration."

V.

The law, as construed by the Supreme Court of Nebraska, operates to deny the plaintiff in error the equal protection of the law.

The law is directed against the teaching in or of a foreign language in public, private, denominational and parochial schools. It leaves those engaged in giving private lessons in such languages free to pursue their vocations.

When this law was before the Supreme Court of Nebraska on a former occasion, the court said:

"If the law means that parents can teach a foreign language, or private tutors employed by men of means may do so, but that poorer men may not employ teachers to give such instruction in a class or school, it would be an invasion of personal liberty, discriminative, and void, there being no reasonable basis of classification; but if such instruction can be given in addition to the regular course, and not so as to interfere with it, then equality and uniformity results, and no one can complain." *Neb. Dist. Ev. Synod, etc., v. McKelvie, et al,* 104 Neb. 93.

But in the case at bar, the court, referring to the foregoing, said:

"Neither the language law nor the compulsory school act mentions the phrase 'regular school hours.' Nor is there any direction in either of those statutes as to how many hours a day, or as to what time of day, school shall be in session. The language law declares that certain subjects shall not be taught in school. Obviously, it was intended that such teachings should not take place whenever the pupils of the school should be assembled in the school for the purpose of receiving instruction. So far, then, as it may have been indicated in the former opinion of Nebraska District E. L. S. v. McKelvie, supra, that the law was aimed to apply only to those school hours which should be set apart

for the teaching of the so-called common school branches, or set apart as 'regular school hours,' we believe that opinion should be modified." (Printed Record, page 54.)

"A statute arbitrarily discriminating against one class in the transaction of the business of a lawful occupation, and leaving unaffected by such discriminatory enactment other persons, or classes of persons, engaged in acquiring property in a manner not distinguishable in character from that in which the class discriminated against is employed, is in contravention of the constitutional guarantees of liberty and property."

In *Bailey v. People,* 83 Am. St. Rep. 116, the court said:

"As we said in *Frorer v. People,* 141 Ill. 181, 31 N. E. 397: 'If A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract.'

"In *Millett v. People,* 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631, an enactment which prohibited the owners and operators of coal mines from making contracts which other owners of property and employers of labor might lawfully make was held unconstitutional, and could not be maintained as a lawful exercise of the police power. The same doctrine was reiterated in *Frorer v. People,* 141 Ill. 176, 31 N. E. 395. In *Ritchie v. People,* 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454, an enactment which prohibited contracts for the employment of females to work for more than eight hours in any one day in any factory or workshop where clothing, wearing apparel, or articles of a similar nature were manufactured, was held to be partial and discriminatory in character, and void, as contravening constitutional guaranties, for the reason that other manufacturers and their employes, though engaged in other branches of industry, were not forbidden to so contract. *In Harding v. People,* 160 Ill. 459, 52 Am. St. Rep. 344, 43 N. E. 624, an act which made 'that an offense if committed by a person en-

gaged in one branch of mining which if done by persons in another branch of the same business is lawful, without any reason for distinction between the two,' was declared to be unconstitutional. In *Eden v. People,* 161 Ill. 296, 52 Am. St. Rep. 365, 43 N. E. 1108, we held a statute which made it unlawful for a barber to follow his ordinary pursuit on Sunday, and which did not place the like restriction on any other class of business, deprived persons following that avocation of property and unjustly discriminated against them, and could not be sustained as a valid enactment under the police power of the state, because of the unequal operation of the law. The doctrine of *Chicago v. Netcher,* 183 Ill. 104, 75 Am. St. Rep. 93, 55 N. E. 707, is an attempt to deny a property right to a particular class in a community where all other members of the community are left to enjoy it as an unwarrantable interference with constitutional rights, whether such denial is contained in a statute or in an ordinance passed under a statute."

In *Dunahoo v. Huber* (Iowa), 171 N. W. 123, it was held that a statutory provision making it a crime for employees to accept tips, but which, by implication, left the employers free to do so, was unjustly discriminatory and unconstitutional.

In *State v. Sloan,* 49 N. J. L. 356, the court said:

"If these objects are distinguished from others by characteristics evincing a peculiar relation to the legislative purpose, and showing the legislation to be reasonably appropriate to the former and inappropriate to the latter, the objects will be considered, as respects such legislation, to be a class by themselves, and legislation affecting such a class to be general. But if the characteristics, used to distinguish the objects to which the legislation applies from others, are not germane to the legislative purpose, or do not indicate some reasonable appropriateness in its application, or if objects with similar characteristics and like relation to the legislative purpose have been excluded from the operation of the law, then the classification would be incomplete and faulty, and the legislation not general, but local or special."

In *State v. Ramsey,* 48 Minn. 236, a law declaring the emission of dense smoke in a city to be a nuisance, but exempting from its operation "manufacturing establishments using the entire product of combustion, and the heat, power and light produced thereby, within the building wherein the same are generated, or within a radius of three hundred feet therefrom," was held unconstitutional, the court saying:

"No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against the nuisance occasioned by dense smoke, and it can make no practical difference in what business the owners or occupants of the buildings in which smoke is produced are engaged, or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or, further, whether steam power is used in manufacturing, or is applied to other uses as a grain elevator or hoisting apparatus in a warehouse."

It was held in *City of Lincoln v. Lincoln Gas & Electric Light Co.,* 182 Fed. 926, that an ordinance imposing an occupation tax upon gas companies furnishing gas to the public for light, heat and power was an arbitrary and unconstitutional classification because it took no account of another company in the same city which was then furnishing light, heat and power to the public by electric current. The same question came later in another suit before this court and was decided in the same way. *City of Lincoln v. Lincoln Gas & Electric Light Co.,* 100 Neb. 182.

In *Hines v. Williams,* 166 N. W. (Mich.) 938, a statute, providing for the sterilization of mentally defective or insane persons, maintained wholly or in part at public expense in public institutions, but making no provisions for such persons located elsewhere, was condemned as unconstitutional classification. It was said that the object of the

law being to prevent the propagation of epileptics, it was in reason just as applicable to those who were not as to those who were confined in public institutions.

In *Smith v. Board of Examiners,* 88 Atl. 863, the Supreme Court of New York, dealing with a statute substantially identical with the Michigan law, reached the same conclusion as the Michigan Court.

CONCLUSION

We respectfully submit that now, that the war spirit has subsided and our minds no longer inflamed by hate or clouded by passion, and we are again able to see with clear vision, statutes of this character must be regarded merely as petty and irritating restrictions on the natural liberty of the individual, and which, instead of unifying, tend to divide the people; instead of fostering patriotism, tend to make the government odious; instead of promoting the purpose for which the government was instituted, tend to thwart that purpose. Such statutes, tested by the avowed purpose of the government, by the spirit that gave birth, by the Fourteenth Amendment, as construed by this Court in scores of cases, operate as unreasonable and arbitrary restraints on the liberty of the individual, his pursuit of happiness, to deprive him of his property without due process of law, contrary to the fundamental law of the land.

Respectfully submitted,

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Number 326.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1922.

ROBERT T. MEYER, PLAINTIFF IN ERROR,

v.

THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF STATE OF NEBRASKA, DEFENDANT IN ERROR.

CLARENCE A. DAVIS, Attorney General of Nebraska,
Attorney for State of Nebraska, Defendant in Error.

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MASON WHEELER, Assistant Attorney General of Nebraska,
Of Counsel.

STATEMENT.

The criminal proceeding, which is the basis of this proceeding in error, when initiated, involved an attempt to undermine and emasculate the Nebraska foreign language law of 1919 (which hereinafter for convenience in this brief is termed the Siman Law to distinguish it from the Nebraska Foreign Language Law of 1921, which will be termed the Norval Law). In 1921 the Siman law was repealed, consequently the only matter involved in this appeal is the imposition of a $25.00 fine.

The history of the case is as follows: On April 9, 1919, the Legislature of Nebraska enacted its first foreign language law, the Siman law, known as Chapter 249 of the Laws of 1919, which reads as follows:

> "INSTRUCTION IN FOREIGN LANGUAGES PROHIBITED.—No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any other language than the English language.
>
> "SAME, EXCEPTION.—Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.
>
> "VIOLATION, PENALTY.—Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five ($25) dollars, nor more than one hundred ($100) dollars or be confined in the county jail for any period not exceeding thirty days for each offense."

An immediate attack was made upon the constitutionality of this law. On December 26, 1919, the Supreme Court of Nebraska, in the case of *Nebraska District of Evangelical Lutheran Synod of Missouri, et al* v. *McKelvie, the Governor, et al*, reported in 104 Neb. 93, held the Siman law constitutional, dissolved the injunction issued against its enforcement, and in its decision construed the statute to permit the teaching of foreign languages outside of regular school hours.

Upon learning of this decision and this construction of the statute, in January, 1920, the Lutheran Parochial School near Hampton, Nebraska, in which plaintiff in error Meyer, was a teacher, by vote of its board, changed its school hours. Previous to the Siman law decision the school hours were from 9 A. M. to 12 noon, and from 1 P. M. to 4 P. M. When the authorities of the school learned that the statute had been construed to permit the teaching of German

to children of tender years outside of school hours the hours of the afternoon session were changed from 1 P. M. to 4 P. M. to 1:30 P. M. to 4 P. M., and the time from noon until 1:30 P. M. was specified as a recess. The school, however, was convened at 1 P. M. and instruction given in German, contrary to the statute from 1. to 1:30 P. M. (Testimony of Brommer, printed record, Pg. 18, 19, Qs. 17 to 22, 39; Raymond Parpart,, record, Pg. 21, 22, Qs. 68, 77 to 88; Frank Edgerton, record, Pg. 30, Qs. 192 to 212).

The testimony in the record shows that the plaintiff in error, Meyer, on May 25, 1920, deliberately taught reading in the German language to a boy ten years of age, who was in the fifth grade of the parochial school in which the plaintiff Meyer was a teacher, this instruction being given between 1 and 1:30 P. M. in said school (Testimony of Raymond Parpart, record, Pg. 30, Qs. 192 to 212; Robert T. Meyer, record, Pg. 39, Qs. 297 to 300; Arthur S. Nelson, County Superintendent, record, Pg. 25, Qs. 132 to 158).

Deeming this change of school hours a mere subterfuge, and a patent attempt to evade the plain provisions of the statute, the plaintiff in error, Meyer (hereinafter in this brief for the sake of convenience termed the defendant) was charged and convicted in the County Court of Hamilton County, Nebraska, of unlawfully teaching reading in the German language on May 25, 1920, to Raymond Parpart, a ten year old boy, who had not passed the eighth grade examination, in violation of the statute known as the Siman Law, and fined $25.00 and costs.

An appeal was taken to the District Court; the defendant tried on the 14th day of December, 1920, and again convicted and fined the same amount (Record, Pgs. 3-5, 12).

When the appeal was originally taken to the Supreme Court of Nebraska, the issue was important, to-wit: whether a parochial school could by arbitrarily changing its school

hours, devote a portion of the time allowed for instruction in ordinary school branches to inculcating minor children with the elements of foreign languages before said children had passed the eighth grade examination, and before they were thoroughly grounded in English, and thus evade the intent and purpose of the Nebraska statute, which prohibited the teaching of foreign languages to pupils under the eighth grade. Of course, if the school hours could be changed to allow a half hour of recess, which could be devoted to the teaching of foreign languages to young children, the school hours could be changed to include a recess of three or four hours in which instruction in foreign languages could be given, and the purpose of the statute nullified.

During the pendency of the appeal to the Supreme Court of Nebraska, and while said appeal was pending, and perhaps because the result of the appeal was feared by the legislature then in session, the Siman act was amended, supplemented and repealed by Chapter 61 of the Laws of Nebraska for 1921 (the Norval Act), which reads as follows and may be found in Sections 6457 to 6462, Compiled Satutes of Nebraska, 1922:

> "ENGLISH, OFFICIAL LANGUAGE.—The English language is hereby declared to be the official language of this state, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools.
>
> "OTHER LANGUAGES, TEACHING FORBIDDEN.—No person, individually or as a teacher, shall, in any private, denominational, or parochial or public school, teach any subject to any person in any language other than the English language.
>
> "SAME, EXCEPTIONS.—Languages other than the English language may be taught as languages only, after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county or the city superintendent of the city in which the child resides. Provided, that the provisions of this act shall not

apply to schools held on Sunday or on some other day of the week which those having the care and custody of the pupils attending same conscientiously observe as the Sabbath, where the object and purpose of such schools is the giving of religious instruction, but shall apply to all other schools and to schools held at all other times. Provided, that nothing in this act shall prohibit any person from teaching his own children in his own home any foreign language.

"UNLAWFUL TO DISCRIMINATE.—It shall be unlawful for any organization, whether social, religious or commercial, to prohibit, forbid or discriminate against the use of the English language in any meeting, school or proceeding, and for any officer, director, member or person in authority in any organization to pass, promulgate, connive at, publish, enforce or attempt to enforce any such prohibition or discrimination.

"VIOLATION, PENALTY.—Any public official, teacher, instructor, or other person who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof be fined in any sum not exceeding one hundred ($100.00) dollars or less than twenty-five ($25.00) dollars, or be confined in the county jail for a period not exceeding thirty days for each offense.

"SECTIONS INDEPENDENT.—Should the courts declare any portion of this act unconstitutional such decision shall affect only the portion so declared to be unconstitutional and shall not affect any other section or any other part of this act, and it is further provided that each part of this act so far as an inducement for the passage of this act is concerned is independent of every other part.

"REPEAL.—Chapter 249, of the Session Laws of Nebraska for 1919, entitled, 'An Act relating to the teaching of foreign languages in the State of Nebraska,' is hereby repealed.

"EMERGENCY.—Whereas, an emergency exists this act shall be in force from and after its passage and approval."

Approved April 14, 1921.

It will be noted that the Norval law of 1921, specifically forbids instruction in foreign language to children under the eighth grade *in all schools and at all times* with the exception of Sunday schools where the purpose of such school is the giving of religious instruction. The constitutionality of the Norval law was sustained by the Nebraska Supreme Court in *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* decided in 187 N. W. 927, an appeal from which decision is now pending in this court as Number 28990, October Term, 1922, No. 440.

We are not concerned with the Norval law in the instant appeal. The constitutionality of that statute will be brought before this court in the Lutheran Synod case No. 440 of the October Term 1922, to be argued at a later date.

The Siman law of 1919, under which the defendant Meyer was convicted, having been repealed, we are no longer concerned, as a matter of public interest, with its interpretation or its constitutionality. The only issue involved in this appeal, except perhaps that of an entering wedge for the determination of *Nebraska District* v. *McKelvie,* is whether the defendant Meyer should stand convicted of a misdemeanor and be compelled to pay the fine of $25.00 imposed because he overstepped the criminal statutes.

The record does not show that the constitutionality of the Siman act either under the state or federal constitution was an issue in the county or district court. The constitutional objections were not set forth in defendant's petition in error in the Supreme Court of Nebraska, the foundation of his appeal to that court (record, Pgs. 1 and 2) nor in defendant's motion for a new trial in the district court (record, Pgs. 11 to 12) which was the basis of his appeal to the Supreme Court of Nebraska.

The questions raised by the motion for a new trial and the petition in error to, and argued before the Supreme Court of Nebraska, were:

(1) The sufficiency of the information as a matter of law.

(2) Whether or not the verdict was contrary to the evidence.

(3) Whether the court's instruction No. 8 (record Pg. 8), as to the shifting of school hours being a subterfuge, was correct.

No federal question was argued before the Supreme Court of Nebraska, although federal questions were discussed in the briefs of both sides in the Supreme Court of Nebraska. Argument on the constitutionality of this law was orally waived by counsel for defendant Meyer in the Supreme Court of Nebraska.

The constitutionality of the Nebraska statute as interfering with religious worship is not involved in this appeal, although it is in the *Evangelical Luthern Synod* v. *McKelvie* case which will be subsequently heard by this court, consequently the religious aspect of the legislation will not be treated in this brief.

ERRORS RELIED ON FOR REVERSAL.

The defendant Meyer in his brief predicates his argument for a reversal on the alleged unconstitutionality of the Nebraska statute under the Fourteenth Amendment to the Constitution of the United States, and urges that the Nebraska statute

(1) Deprives the defendant of his liberty;

(2) Abridges his privileges and immunities as a citizen of the United States (it will be noted that the record contains no proof that he is a citizen);

(3) Is not a legitimate exercise of the police power.

POINTS AND AUTHORITIES.

I.

The federal constitutional question was injected into this case as an afterthought and too late to permit its review by the Supreme Court of the United States.

Osborne v. *Clark,* 204 U. S. 565.
St. L. & S. F. Ry. Co. v. *Shepard,* 240 U. S. 240.
Sayward v. *Denny,* 158 U. S. 180.
Hulbert v. *City of Chicago,* 202 U. S. 275.
Marvin v. *Trout,* 199 U. S. 212.
Con. Turn Pike v. *Nfk. Ry. Co.,* 228 U. S. 326.
Calif. Powder Works v. *Davis,* 151 U. S. 389.
Fowler v. *Lamson,* 164 U. S. 252.
Heim v. *McCall,* 239 U. S. 175.
Cochrane Oil Co. v. *Arnaudt,* 199 U. S. 182.

II.

The Nebraska Foreign Language Statute (Siman Law) was a legitimate exercise of the police power of the state.

Meyer v. *State,* (Neb.) 187 N. W. 100, decision below, pages 49 to 55 of the printed record.
Nebr. Dist. Evang. Synod, etc. v. *McKelvie,* 104 Neb. 93.
Nebr. Dist. Evang. Synod v. *McKelvie,* (Norval Law case), 187 N. W. 927.
Freund on Police Power, Sections 143, 479, 264 to 266.
Block v. *Hirsh,* 256 U. S. 135.
Pohl v. *State,* (Ohio), 102 Ohio State 474.
Bartels v. *State,* (Iowa) 191 Iowa 1060.
Muller v. *Oregon,* 208 U. S. 412.
Noble State Bank v. *Haskell,* 219 U. S. 104, 575.
Wenham v. *State,* 65 Neb. 394.
C. B. & Q. R. R. Co. v. *McGuire,* 219 U. S. 549.
Halter v. *Neb.* 205 U. S. 34.
McLean v. *Arkansas,* 211 U. S. 539.
Holden v. *Hardy,* 169 U. S. 366.
Jacobson v. *Massachusetts,* 197 U. S. 11.

Atkin v. *Kansas,* 191 U. S. 207.
Tanner v. *Little,* 240 U. S. 369.
Slaughter House Cases, 16 Wallace 36.
Murphy v. *Calif.,* 225 U. S. 623.
Booth v. *Illinois,* 184 U. S. 425.
Wilson v. *New,* (Adamson Law case) 243 U. S. 332.
Second Employers Liability Cases, 223 U. S. 1.
Matter of Gregory, 219 U. S. 216.
Rast v. *Van Deman,* 240 U. S. 342.
Pitney v. *Wash.,* 240 U. S. 387.
Arizona Employers Liability Cases, 250 U. S. 400.
Gilbert v. *Minn.,* 254 U. S. 325.
Barbier v. *Connolly,* 113 U. S. 27.
Mugler v. *Kansas,* 123 U. S. 623.
Foreign Language Laws of twenty-one states detailed on pages 24-29 of this brief.

III.

The Nebraska Satute does not illegally interfere with the defendant Meyer's occupation as a teacher.

Wenham v. *State,* 65 Neb. 394.
Barbier v. *Connolly,* 113 U. S. 27.
Mugler v. *Kansas,* 123 U S. 623.
Halter v. *Neb.* 205 U. S. 34.
McLean v. *Arkansas,* 211 U. S. 539.
Muller v. *Oregon,* 208 U. S. 412.
And cases cited under Point. II.

IV.

The Nebraska foreign language legislation (Siman Act) does not substantially deny defendant Meyer the equal protection of the law.

Evang. Lutheran Synod v. *McKelvie,* 187 N. W. 927.
Halter v. *Neb.* 205 U. S. 34.
Pohl v. *State,* 102 Ohio State 474.
Miller v. *Wilson,* 236 U. S. 373.
C. B. & Q. R. R. Co. v. *McGuire,* 219 U. S. 549.
Lindsley v. *Nat. Carbonic Gas Co.,* 220 U. S. 61.

Johnston v. *Kennecott Copper Corp,* 248 Fed. 407.
Quong Wong v. *Kirkendale,* 223 U. S. 59.
Lower Vein Coal Co. v. *Industrial Board of Ind.,* 255 U. S. 144.

ARGUMENT.

I.

The Federal constitutional question was injected into the case as an afterthought and too late to permit its review by the Supreme Court of the United States.

No federal question or claim of unconstitutionality was made in the petition in error to the Nebraska Supreme Court (record, Pgs. 1 and 2) nor in the motion for a new trial in the state district court (Record, Pg. 11), nor in any pleading or filed paper until the motion for a rehearing in the Nebraska Supreme Court after the decision in said court (Record, Pgs. 57 to 60). No federal question was mentioned in the opinion of the Nebraska Supreme Court, nor considered in said opinion (record, Pgs. 49 to 55). The question of constitutionality under the federal constitution was discussed in the brief but expressly waived by counsel for defendant Meyer in the oral argument before the Nebraska Supreme Court.

The decision in the Nebraska court rested on the sufficiency of the information, the sufficiency of evidence to sustain the verdict and the correctness of the court's instruction No. 8 to the matter of subterfuge (record, Pg. 8; Opinion below, record pp. 49-55).

Only after the determination by the Nebraska Supreme Court of the matters argued before it was this federal question raised, and then only in a motion for a rehearing. Judge Morrissey, one of the two dissenting judges of a court composed of seven judges, reasoning by inference in a memoranda denying the defendant's motion for a rehearing before the Nebraska Supreme Court (record Pgs. 62 and 63) said that the Supreme Court had necessarily passed on the question of whether the Nebraska Language Law violated the 14th

Amendment to the Constitution of the United States, upon the assumption that the Nebraska court would not have sustained the statute had it contravened the 14th Amendment to the Federal Constitution. The assignment of errors to the Supreme Court of the United States (record, Pg. 64) filed after the arguments presented in the state courts, fairly teems with allegations of violation of the federal constitution. These questions should have been presented and argued to the Nebraska Supreme Court. Their inclusion in the motion for a rehearing and on the appeal presented to the United States Supreme Court is a mere afterthought.

It would seem that the question of federal unconstitutionality was raised too late to permit a review in this court.

St. L. & S. F. Ry. Co. v. *Shepard,* 240 U. S. 240.
Osborne v. *Clark,* 204 U. S. 565.
Sayward v. *Denny,* 158 U. S. 180.
Hulbert v. *City of Chicago,* 202 U. S. 275.
Marvin v. *Trout,* 199 U. S. 212.
Con. Turn Pike v. *Norfolk Ry. Co.,* 228 U. S. 326.

The fact that Judge Morrissey of the Nebraska Supreme Court certified a federal question to this court is insufficient. The fact that the state court considered the federal question must appear from the record itself and not from the certificate of a judge. It should have been raised in the state court by appropriate assignments of error.

The petition for a writ of error, briefs of counsel and assignments of error in the Supreme Court of the United States form no part of the record for the purpose of proving that the federal question was duly raised in the court below.

Calif. Powder Works v. *Davis,* 151 U. S. 389.
Fowler v. *Lamson,* 164 U. S. 252.

The general rule is that it must clearly and unmistakably appear from the opinion of the highest court of the state that

a federal question was there raised and there actually decided.

Heim v. *McCall*, 239 U. S. 175.
Cockrane Oil Co. v. *Arnaudet*, 199 U. S. 182.

If, however, this court determines this preliminary objection adversely to the defendant in error, like a military leader whose outposts are driven in we retire to our main line of defense and in this brief endeavor to sustain the validity of the language legislation as a legitimate exercise of the police power, and to answer the defendant's contention that the legislation interferes with his lawful occupation as a teacher and denies him the equal protection of the law.

II.

The Nebraska Foreign Language Statute (Siman Law) was a legitimate exercise of the police power of the State.

An examination of the statute set forth in full at page 2 of this brief shows that the act forbids the teaching of foreign languages to children of tender years before such children are grounded in the English tongue. The statute does not forbid the use of foreign languages by persons of maturity or prevent the study of foreign languages by persons who have passed the eighth grade. It does not in any way interfere with bona fide religious instruction or with any legitimate religion.

The object of the legislation as is so clearly pointed out by the Nebraska Supreme Court in *Nebraska District* v. *McKelvie*, 104 Neb. 93, and in the second case, 187 N. W. 927, and in the decision below (record, Pgs. 49 to 55), and by the Ohio Supreme Court in *Pohl* v. *Ohio*, 102 O. St. 474, and by the Iowa Supreme Court in *Bartels* v. *State*, 191 Iowa 1060, was to create an enlightened American citizenship in sympathy with the principles and ideals of this country, and to prevent children reared in America from being trained and educated in foreign languages and foreign ideals before they

have had an opportunity to learn the English language and observe American ideals. It is a well known fact that the language first learned by a child remains his mother tongue and the language of his heart. The purpose of the statute is to insure that the English language shall be the mother tongue and the language of the heart of the children reared in this country who will eventually become the citizens of this country.

The statute is a part of a general Americanization program to bring our citizenry towards the belief that the American government is one of, by, and for the people, that it is a government whose just powers are derived from the consent of the people, that it is a true democracy established in a republic, as a sovereign nation of forty-eight sovereign states, a perfect union, one and inseparable, established on principles of freedom, equality, justice and humanity, for the foundation and perpetuation of which American patriots have and will sacrifice their lives and imperil their fortunes.

These foreign language statutes are no more difficult to sustain under the police power of the state than the Bank Guarantee Act, the Workmen's Compensation Acts, the Female Labor Laws, and Tenement Housing legislation.

As is shown by the decisions above quoted isolated communities exist in Nebraska where foreign languages are used; which communities are under the control of foreign leaders and cannot be reached by American newspapers, or except through the medium of a foreign tongue; that these communities are growing up as little Germanys, little Italys and little Hungarys; that the children are being reared in a foreign atmosphere and in and by foreign language, and that so long as these conditions continue, such communities cannot well be assimilated into our American Republic. It was to obviate this danger to the state that the Nebraska legislature required that the primary education of Nebraska children should be exclusively in English.

Taking the test laid down as to the legitimate exercise of the police power by Prof. Freund, in his excellent treatise on the police power (Section 143):

"Does a danger exist?" "Is it of sufficient magnitude?" Any intelligent observer can see it. The legislature so considered it. The Nebraska Supreme Court called particular attention to it in the decision below and in the two cases of *Evangelical Lutheran Synod* v. *McKelvie, the Governor et al.*, 104 Neb. 93 and 187 N. W. 927.

"Does it concern the public?" The education of the youth, the training for common citizenship is of vital public concern in a government which depends upon the intelligence of the electorate.

"Does the proposed measure tend to remove it?" The menace of unassimilated social groups differentiated by language will disappear in a generation when all children are first required to master English in their mother tongue. A common language is our greatest assimilator.

"Is the restraint a requirement in proportion to the dangers?" The statute requires only a foundation in English before the study in other languages is attempted. After a child has finished the eighth grade any foreign language may be studied. "English first" is the purpose of the statute.

"Is it possible to secure the object sought without impairing essential rights and principles?" The constitutionality of legislation in respect to hours and wages of railway trainmen was upheld in the Adamson law case, *Wilson* v. *New*, 243 U. S. 332; regulations in respect to the working hours of women in *Muller* v. *Oregon*, 208 U. S. 412; compensation for industrial accidents in *Employers Liability Cases*, 223 U. S. 1; *Arizona Employers Liability Cases*, 250 U. S. 400, and legislation regulating rents in municipalities in *Block* v. *Hirsh*, 256 U. S. 135. If it is within the police power of the state to regulate wages, to legislate respecting housing condi-

tions in crowded cities, to prhoibit dark rooms in tenement houses, to compel landlords to place windows in their tenements which will enable their tenants to enjoy the sunshine, it is within the police power of the state to compel every resident of Nebraska to so educate his children that the sunshine of American ideals will permeate the life of the future citizens of this republic. A father has no inalienable constitutional right to rear his children in phyhical, moral or intellectual gloom. As to all these matters the judgment of the legislature is to be taken as correct unless it appears clearly wrong.

Again in his work on Police Power, Prof. Freund, paragraph 479, says:

> "The state has power to control the education of minors and in doing so may further the interests of nationality, but where minors are not concerned, the pursuit of truth and learning must be absolutely free. These principles are so fully recognized by the practice of legislation that they stand unquestioned even if lacking express judicial confirmation."

And in paragraph 274 the same learned author lays down the proposition that the direction of education of children is certainly not beyond the police power, and that this is true whether the education be carried on in private or public schools.

In upholding the statute under consideration the Supreme Court of Nebraska in the Siman law case, *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie*, 104 Neb. 93, 99, said:

> "The ultimate object and end of the state in thus assuming control of the education of its people is the upbuilding of an intelligent American citizenship, familiar with the principles and ideals upon which this government was founded, to imbue the alien child with the tradition of our past, to give him knowledge of the lives of Washington, Franklin, Adams, Lincoln and other men who lived in accorda e with such ideals, and to

teach love for his country, and hatred of dictatorship, whether by autocrats, by the proletariat, or by any man or class of men.

"Philosophers long ago pointed out that the safety of a democracy, or republic, rests upon the intelligence and virtue of its citizens. 'The safety of the people is the supreme law.' * * * The state should control the education of its citizens far enough to see that it is given in the language of their country, and to insure that they understand the nature of the government under which they live, and are competent to take part in it. * * * It has been said by the United States Supreme Court in *Gundling* v. *Chicago*, 177 U. S. 183, that the courts will not interfere with the operation of a regulative statute, 'unless the regulations are so utterly unreasonable and extravagant in their nature and purposes that the property and personal rights of the citizens are unnecessarily and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference.' *Giozza* v. *Tiernan*, 148 U. S. 657.

"Neither the constitution of the state nor the Fourteenth Amendment takes away the power of the state to enact a law that may fairly be said to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order. 'If the state may compel the solvent bank to help pay losses sustained by depositors in insolvent banks, if it may enact workmen's compensation laws in order that the workman shall have no strained relations with his employer, nor become embittered towards society because, though an industry has crippled him, it has paid him nothing, if acts aiming to make better citizens by diminishing the chances of pauperism are sustained, if it is competent for the state to protect the minor from impoverishing himself by contract, it surely is not an arbitrary exercise of the functions of the state to insist' that the fundamental basis of the education of its citizens shall be the knowledge of the language, history and nature of government of the United States, *and to prohibit anything which may interfere with such education.* Laws,

the purpose of which are with respect to foreign language speaking children, to give them such training that they may know and understand their privileges, duties, powers and responsibilities as American citizens, which seek to prevent a foreign language from being used as the medium of instruction in other branches, and as the basis of their education are certainly conducive to the public welfare, and are not obnoxious to any provision of either the state or federal constitution."

In touching upon the need for this legislation the Supreme Court of Nebraska in the decision above quoted, at page 97, said:

"The operation of the selective draft law disclosed a condition in the body politic which theretofore had been appreciated to some extent, but the evil consequences of which had not been fully comprehended. It is a matter of general public information, of which the court is entitled to take judicial knowledge, that it was disclosed that thousands of men born in this country of foreign language speaking parents and educated in schools taught in a foreign language were unable to read, write or speak the language of their country, or understand words of command given in English. *It was also demonstrated that there were local foci of alien enemy sentiment, and that, where such instances occurred, the education given by private or parochial schools in that community was usually found to be that which had been given mainly in a foreign language.*

"The purpose of the new legislation was to remedy this very apparent need, and by amendment to the school laws make it compulsory that every child in the state should receive its fundamental and primary education in the English language."

It will be noted that this is not the argumentative language of zealous counsel, but is a judicial finding by the highest court of the state of actual conditions as existent in the commonwealth of Nebraska before the passage of this foreign language legislation.

In discussing the purpose of the legislation in the case below, the Supreme Court of Nebraska (*Meyer* v. *State,* 187 N. W. 100) (Printed record, Pg. 52) said:

> "The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interest of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state."

And in further discussing the new law (the Norval Act of 1921) the Supreme Court of Nebraska in the case of *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* 187 N. W. 927, said:

> "The reasons found by the Legislature for this enactment, we believe are set out in our opinion in *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* 104 Neb. 93 and *Meyer* v. *State.* The legislature intended that the English language should become the universal language of the state; that children of foreign parentage should be so reared and educated that English would come to be their natural language and the language which they would continue to use. Children of foreign parentage, first starting to school, are able to talk the

language of their parents. That language is at that time the one naturally favored by them. *The requirement that children who have not passed the eighth grade shall in language study apply themselves exclusively to the English language, so that English shall be mastered and become the more favored one, we are not ready to say is a measure more stringent than is warranted, nor that the Legislature has acted without reason and in a purely arbitrary manner. The law does not create an absolute prohibition against the learning of a foreign language. It only postpones and regulates that teaching. There is no curb on knowledge, such children have a sufficient task to master English in what time and opportunity is available to them for language study. When the child becomes sufficiently versed in English, which in the eyes of the law, is when he has passed the eighth grade, and has received the instruction in English which necessarily goes with that extent of education, when that language has become his language, then he is free to study whatsoever language he pleases. The statute was enacted in a jealous regard to further and assure the universal use of English, and as a means to that end, to curtail, so far as could reasonably be done, the rearing of children of foreign parentage in the language of their parents.* * * *

"It appears to us that the law is a reasonable exercise of the police power and is not unconstitutional, as in violation either of the state or of the Federal Constitution. In its operation it does not deprive any person of life, liberty or property without due process of law, nor does it deny the equal protection of the law. It does not interfere with religious liberty nor with the giving of religious instruction."

In sustaining the constitutionality of the Ohio foreign language act, which is substantially the same as that of Nebraska, the Supreme Court of Ohio in *Pohl* v. *State*, 102 Ohio State 474, said:

"While much consideration in arguments and briefs has been given to the wisdom of the provisions of Sections 7762-1 and 7762-2, General Code, this court is of the

opinion that such argument might better be addressed to the legislative branch of the government.

"Courts do not sit to review the wisdom of legislative acts, nor do they possess such power. On the contrary, the policy, the advisability, and the wisdom of all legislation, subject to the veto of the governor and the referendum of the people, are subjects for legislative determination exclusively. The inexpediency, injustice or impropriety of a legislative act are not grounds upon which the court may declare the act void. The remedy for such evils must be sought by an appeal to the justice and patriotism of the legislature itself. Except as limited by the Federal and State Constitutions, the power of the general assembly to legislate is inherent and unlimited and covers the whole range of legitimate legislation.

"If the general assembly in the exercise of its power to legislate enacts laws necessary for the welfare of society, and thereby makes unlawful conduct theretofore lawful, such legislation will not be held to be unconstitutional simply because it forbids the doing of things theretofore permitted. The 'enjoying and defending life and liberty * * * and seeking and obtaining happiness' do not contemplate that they shall be enjoyed, sought and obtained as they were enjoyed, sought and obtained by primitive man, but that they shall be enjoyed, sought and obtained with such regard to the rights of society as the common welfare, as defined by the legislature, requires. It is upon this theory that our system of government exists.

"The legislation in question is of equal application to every pupil of the state who has not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools regardless of nationality, ancestry, or place of birth, and is therefore, of equal operation upon every person within the designated grade.

"The constitutionality of the act under consideration is, therefore, dependent upon whether the common welfare requires such legislation. The legislature is presumed to have had before it such information with reference to the effect of the teaching of the German language

to the youth of the state below the eighth grade as justified it in concluding that the common welfare required the prohibition of such teaching to such youth, and if the legislature found such facts to exist as to warrant it in the enactment of the sections in question it is not within the province of a court to redetermine the existence or non-existence of such facts, even though the court might upon such redetermination reach a different conclusion. If under any possible state of facts the sections would be constitutional, this court is bound to presume that such facts exist.

"No principle is better established by the decisions of the federal and state courts than that the possession and enjoyment of all rights are subject to such reasonable regulations as are deemed by the legislative authority to be essential to the welfare of the state, and every intendment is to be made in favor of the validity and lawfullness of such regulations unless they are clearly unreasonable and violative of some express provision of the constitution.

"For these reasons we are unable to reach the conclusion that Sections 7762-1 and 7762-2 are unconstitutional, and the judgment of the court of appeals will, therefore, be affirmed."

The Supreme Court of Iowa in affirming the conviction of one Bartels who was convicted of the violation of the Iowa foreign language act by teaching reading in German in *State* v. *Bartels*, 191 Iowa 1060, said:

"The state has a right to adopt a general policy of its own respecting the health, social welfare and education of its citizens, and as long as it does no violation to constitutional inhibitions the citizen within its borders has no other alternative than to obey or remove to a more congenial environment. Iowa has not been backward in enacting legislation under these well recognized powers. Our public health statutes, providing for compulsory quarantine and similar regulations, have been upheld and enforced. A citizen may feel that he has a perfect right to determine for himself whether his child under 16 years of age shall be employed, and the hours

and conditions of such service, but, if so, he must acquire residence in some state which has no child labor law similar to ours. So, too, with many other statutes which have been enacted by our General Assembly, and are the settled policy of this state. To all such, the person, native-born or foreigner, who seeks residence within this commonwealth must subscribe. From the earliest days the settled policy of this state has been to foster, encourage and promote the education of its youth. Our great public school system and our state institutions of higher education are the outcome and result of this policy. No one will dispute the power and the right of the state to adopt and carry out such a beneficent policy. * * *

"The policy of the state has been a progressive one, but it has been consistent and in full keeping with its powers to do all these things for the better training and education of its youth for the full duties and responsibilities of American citizenship. *The advent of the great World War revealed a situation which must have appealed very strongly to the Legislature as justifying the enactment of this statute. Men called to the colors were found to be in some instances not sufficiently familiar with the English language to understand military commands or to read military orders. It was to meet this situation, to encourage the more complete assimilation of all foreigners into our American life, to expedite the full Americanization of all our citizens that the Legislature deemed this statute for the best interests of the state.*

"The manifest design of this language statute is to supplement the compulsory education law by requiring that the branches enumerated to be taught shall be taught in the English language and in no other. * * *

"The policy of the state is apparent, and the evil sought to be remedied is manifest. With the wisdom of the act of the Legislature in passing the statute in question as a means of meeting this situation and seeking to remedy the same we have no concern whatever. That question was wholly for the determination of the General Assembly. They adopted such means as to them seemed wise, appropriate and efficient. * * *

"From an early day it has been the rule of this court that a law will be declared to be unconstitutional only when it is 'clearly, plainly and palpably so.' * * *

"The statute in no manner whatsoever interferes with religious freedom. It is expressly limited to secular subjects. There is scarcely any secular subject taught in our schools that cannot fairly be said to be used in some way in connection with religious instruction or religious belief. It would be going to extreme lengths to say that the regulation of the teaching of such a subject was an interference with religious freedom, because it might be utilized in acquiring religious instruction in some way. Arithmetic, history, writing, geography, all are properly used in religious instruction to some degree. As bearing on this feature of the discussion, see *Owens* v. *State*, 6 Okla Cr. 110, 116 Pac. 345, 36 L. R. A. (N. S.) 633, Ann. Cas. 1913B, 1218; *Smith* v. *People*, 51 Colo. 270, 117 Pac. 612, 36 L. R. A. (N. S.) 158; *Reynolds* v. *U. S.*, 98 U. S. 145, 25 L. Ed. 244. * * *

"As we have observed, a known evil existed; it was within the power of the Legislature to seek to remedy it by the enactment of this statute. The defendant has a right to engage in the profession of teaching, but in so doing he is subject to such legislative enactments as may be fairly and reasonably said to be for the public welfare. We think this statute was a proper and reasonable exercise of the police power of the state in attempting to prevent an existing evil which the Legislature regarded as inimical to the public welfare. Such being the case, the defendant has not been denied any privileges guaranteed him by the Constitution."

The recognized general necessity for legislation similar to the Nebraska foreign language act, the recognition of the threatened menace and the proper remedy is shown by the fact that twenty-one states besides Nebraska have enacted similar foreign language laws. This Siman law is not a unique vagary of the Nebraska legislature.

For the convenience of the court, we have incorporated in this brief the legislation of twenty-one states:

CALIFORNIA—Section 1664, Political Code:

"All schools must be taught in the English language * * *"

COLORADO—Section 6010, Chapter, 179 of the 1919 Session Laws (Pg. 599):

"Instruction in the common branches of study in the public elementary schools of this state shall be conducted through the medium of the English language only, nor shall any other than the English language be taught as a separate and distinct branch of itself.

"During the time that the public schools of the district in which he is a resident are in session, no child of school age who has not completed the eighth grade shall be permitted to attend any school where the common branches are not taught in the English language."

DELAWARE—Section 11, Chapter 157, Laws of 1919 (Pg. 356) Rev. Code 2283:

"In every elementary school of and in the state there shall be taught at least reading * * * oral and written English * * English shall be the only language employed and taught in the first six grades of the elementary schools of and in the state, provided in case this provision is violated by individuals, private educational associations, corporations, or institutions, the state board of education shall take such legal action as will enjoin such violation."

INDIANA—Section 1, Chapter 18, Laws of 1919 (Pg. 50):

"That all subjects and branches taught in the elementary schools of the state of Indiana, and all elementary schools maintained in connection with benevolent or correctional institutions, shall be taught in the English language only, and the trustee * * * shall have taught in them * * * English grammar, * * * Provided, that the German language shall not be taught in any of the elementary schools of this state * * *."

"All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that prescribed for the first eight grades of the elementary schools of this state, shall be taught in the English language only, * * * Provided, that the German language shall not be taught in any such schools within this state."

KANSAS—Chapter 272, Laws of 1919, amending Section 9415, Gen. Stat. 1915:

"Every parent, guardian, or other person in the state of Kansas having control or charge of any child or children having reached the age of 8 years and under 16 years shall be required to send such child or children to a public school or a private, denominational or parochial school in which all instruction shall be given in the English language only, each school year, for such time as said school is in session."

Chapter 257, Laws of 1919 (Pg. 352):

"All elementary schools in this state, whether public, private or parochial, shall use the English language exclusively as the medium of instruction."

LOUISIANA—Section 1, Act 114, Laws of 1918 (Pg. 188):

"It shall be unlawful for any teacher, professor, lecturer, person or persons employed in the public, private, elementary or high schools, colleges, universities, or other institutions, in the state of Louisiana that in any way form part of the public or private educational system or educational work in the state of Louisiana, to teach the German language to any pupils or class."

Section 1, Act. 177, Laws of 1918 (Pg. 332):

"That any and all persons, firms, partnerships, corporations, and associations or organizations of any and every form and character, all and singular, directly and indirectly, be and are hereby prohibited in this state from * * *; and likewise prohibiting the use or display

of any sign, insignia, name, designation, title, phrase, circular, or other form of advertising or description, written, printed, or appearing in the German language or that of any nation allied with Germany, or derived from such language, whether same refers to any article or thing of German origin or not; and likewise prohibiting the sale, exchange, the giving away, distribution, delivering, or in any manner conveying to another or others, or offering or contracting to sell or otherwise dispose of, or to exhibit or display for sale or any other purpose, any book, paper, magazine, or other publication, written or printed or appearing in the German language or the language of any ally of Germany * * *."

MINNESOTA—Section 1, Chapter 320, Session Laws of 1919 (Pg. 337):

"Every child between eight and sixteen years of age shall attend a public school, or a private school, in each year during the entire time the public schools in the district in which the child resides are in session; provided, however, that no child shall be required to attend public school more than ten (10) months during any calendar year. In districts maintaining terms of unequal length in different public schools, this requirement shall be satisfied by attendance during the shorter term.

"A school, to satisfy the requirements of compulsory attendance, must be one in which all the common branches are taught in the English language, from textbooks written in the English language and taught by teachers qualified to teach in the English language. A foreign language may be taught when such language is an elective or a prescribed subject of the curriculum, but not to exceed one hour in each day."

MONTANA—Section 912, 1 Revised Codes 1917:

"All schools shall be taught in the English language * * *."

NORTH DAKOTA—Chapter 41, Laws of 1918:

"All instruction (in public and private schools) shall be given only and entirely in the English language. It

shall be unlawful to teach any subject, except foreign and ancient languages, in any high school, academy, college, or higher institution of learning in this state, or in any private school, academy, college, or institution of higher learning, except foreign and ancient languages and religious subjects, in any but the English language."

OKLAHOMA—Section 1, Chap. 141, Laws of 1919 (Pg. 201):

"That the English language is hereby declared to be the language of the people of the state of Oklahoma. And it shall be unlawful to teach or instruct in any other language in any public, parochial, denominational, or private school or other institution of learning within the state of Oklahoma, except pupils receiving such instruc tion shall have completed the eight grades of the common school curriculum as designated by the state board of education.

"Sec. 2. All textbooks used in the first eight grades of all said schools shall be printed in the English language. (Penalty, fine, jail.)

SOUTH CAROLINA—Section 5, Chap. 135, Session Laws of 1919 (Pg. 206):

"That any private or parochial school attended by any child between eight and fourteen years of age shall be first approved by the State Board of Education. Such school must give its instruction in the English language, and it must teach such subjects as are required in a similar public school in South Carolina."

SOUTH DAKOTA—Section 1, Chap. 41, Laws of 1918:

"Every person having under his control a child of the age of 8 years and not exceeding the age of 16 years shall annually cause such child to regularly attend some public school, or private day school, for the entire annual term in each year during which the public school in the district in which such person resides is in session, until such child shall have completed the first eight grades of the regular common school course; * * * Provided,

further, that all such instruction shall be given only and entirely in the English language."

OHIO—1919 session of the legislature passed the following act:

"Sec. 7762-1. That all subjects and branches taught in the elementary schools of the state of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors and such other officers as may be in control, shall cause to be taught in the elementary schools all branches named in Section 7648 of the General Code. Provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this state.

"Sec. 7762-2. All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of this state, shall be taught in the English language only, and the person or persons, trustees or officers in control shall cause to be taught in them such branches of learning as prescribed in Section 7648 of the General Code or such as the advancement of pupils may require, and the persons or officers in control direct provided that the German language shall not be taught below the eighth grade in any such schools within this state."

"Sec. 7762-3. Any person or persons violating the provisions of this act shall be guilty of a misdemeanor and shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each separate day in which such act shall be violated shall constitute a separate offense.

"Sec. 7762-4. In case any section or sections of this act shall be held to be unconstitutional by the Supreme Court of Ohio such decision shall not affect the validity of the remaining section."

IOWA—38th General Assembly passed the following act:

> "Section 2263—Compiled Code of Iowa.
> "The medium of instruction in all secular subjects taught in all of the schools, public and private, within the state of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited; provided, however, that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course in any such school, in all courses above the eighth grade."

WASHINGTON—Section 4889 of the 1919 General Statutes:

> "All common schools shall be taught in the English language * * *."

Other states having similar laws are:

IDAHO—Page 492 of the 1919 Session Laws.

ILLINOIS—Page 917, 1919 Session Laws.

MASSACHUSETTS—Page 478, Revised Laws of 1902.

NEVADA—Page 247, 1919 Session Laws.

OREGON—Page 34, 1919 Session Laws.

WEST VIRGINIA—Chapter 2, 1919 Session Laws.

In no state has this foreign language legislation been successfully attacked. Three attempts only have been made, in Ohio, Iowa and Nebraska. In every adjudicated case the legislation has been upheld and sustained as against all constitutional objections.

The following principles and their application in respect to the police power may be gleaned from recent decisions of the Supreme Court of the United States. It will be noted that the latter decisions extend the police power to many occupations and situations to which the earlier decisions did not.

The police power itself is an attribute of sovereignty. It exists without any reservation in the Constitution. It is founded on the right of the state to protect its citizens, to provide for their welfare and progress and to insure the good of society. It corresponds to the right of self preservation in the individual. Its application varies with the exigencies of the situation and with the progress of mankind. It is the foundation of our social system and upon it depends the security of social order, the life and health of the citizen, the comfort of existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. It extends to the protection of life, health, comfort and welfare of persons and also to property, and to the welfare of the state itself. All natural persons within the jurisdiction hold their property and pursue their various callings subject to the police power. It is inherent in the various states of the Union, as well as in the Federal government. To the extent that property or business is devoted to public use or is affected with a public interest it is subject to regulation by the police power. It extends to regulation of education as the very existence of our government, as well as its progress and development, depends upon the intelligence of our citizenry.

In the case of *McLean* v. *Arkansas*, 211 U. S. 539, the Supreme Court of the United States, in upholding a statute of Arkansas providing that in coal mines the miners' output must be weighed before it was screened as against the objection that it was not a proper exercise of the police power and that it was an unjust discrimination against persons engaged in the mining industry, the court said:

> "But in many cases in this court the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the state, enacted for the protection of the public health, safety or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract.

"It is then the established doctrine of this court that liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health and welfare of the people. * * *

"The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Mugler* v. *Kansas*, 123 U. S. 623; *Minnesota* v. *Barber*, 136 U. S. 313, 320; *Atkin* v. *Kansas*, 191 U. S. 207."

In *Muller* v. *Oregon*, 208 U. S. 412, a noteworthy case in which Justice Brandeis was counsel, a statute of Oregon limiting the hours of labor of female employees in certain industries was upheld as within the Fourteenth Amendment to the Constitution of the United States, on the ground that the physical structure and maternal functions of woman placed her at an industrial disadvantage, and as healthy mothers were deemed essential to the production of vigorous offspring, the physical well-being of women became an object of public interest and care. In order to preserve the strength and vigor of the race her hours of labor could be limited by the legislature. It was within the province of the state to protect her from the greed of an employer as well as from promiscuous lust.

In *Holden* v. *Hardy*, 169 U. S. 366, an eight-hour labor law applying to the mining industry was held constitutional. In *Jacobson* v. *Massachusetts*, 197 U. S. 11, a law requiring vaccination against smallpox was upheld. In *Atkin* v. *Kansas*, 191 U. S. 207, a statute of Kansas prescribing the maximum day of labor at eight hours for those employed on public works, was upheld.

In *Murphy* v. *California,* 225 U. S. 623, this court upheld as within the police power an ordinance of a California municipality which prohibited the maintenance of billard rooms within municipal limits except in connection with hotels. It was said that the Fourteenth Amendment to the Federal Constitution was never intended to protect billiard-hall proprietors in their occupation as against the exercise of the police power of the city, the language of the court being:

> "The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but does not prevent legislation intended to regulate useful occupations, which because of their nature and location, may prove injurious or offensive to the public."

The court in short order and with a mere statement that there was no merit therein disposed of the contention that the ordinance amounted to a denial of equal protection of the law because it permitted hotels to retain billiard tables.

In *Booth* v. *Illinois,* 184 U. S. 425, an Illinois statute against dealing in grain futures was upheld on the theory that courts had nothing to do with the policy of legislation. The rule as to the protection provided by the Fourteenth Amendment to the Federal Constitution was stated as follows:

> "If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law. *Mugler* v. *Kansas,* 123 U. S. 623; *Minnesota* v. *Barber,* 136 U. S. 313, 320; *Brimmer* v. *Rebman,* 138 U. S. 78; *Voight* v. *Wright,* 141 U. S. 62."

In the *Second Employers' Liability Cases,* 223 U. S. 1, this court held that congress, by virtue of its constitutional power

to regulate interstate commerce, could enact a transportation employees' liability act providing compensation to all injured in the course of employment without regard to the negligence of the employer or a fellow servant and thus could change existing rules regarding liability for injuries and freedom of contract, and could thus supersede existing state legislation on these subjects.

In *Noble State Bank* v. *Haskell*, 219 U. S. 104, in upholding the constitutionality of a state bank guaranty law, the court said in respect to the alleged conflict between the police power and the guaranty act:

> "In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power.
>
> "The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see *Receiver of Danby* v. *State Treasurer*, 3 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its imme-

diate purpose, is a private use. *Clark* v. *Nash,* 198 U. S. 361; *Strickley* v. *Highland Boy Mining Co.,* 200 U. S. 527, 531; *Offield* v. *New York, New Haven & Hartford R. R. Co.,* 203 U. S. 372; *Bacon* v. *Walker,* 204 U. S. 311, 315.

"It may be said in a general way that the police power extends to all the great public needs. *Canfield* v. *United States,* 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of these conditions at the present time is the possibility of payment of checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it.

"The question that we have decided is not much helped by the propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the States may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above described co-operation are necessary safeguards, this court certainly cannot say that it is wrong. *North Dakota* v. *Woodmansee,* 1 N. Dak. 246;

Brady v. *Mattern*, 125 Iowa 158; *Weed* v. *Bergh*, 141 Wis. 569; *Commonwealth* v. *Vrooman*, 164 Pa. 306; *Myers* v. *Irwin*, 2 S. & R. 368; *Myers* v. *Manhattan Bank*, 20 Ohio 283, 302; *Attorney General* v. *Utica Insurance Co.*, 2 Johns. Ch. 371, 377."

In denying a motion for a rehearing in this case, *Noble State Bank* v. *Haskell*, 219 U. S. 575, the court said:

> "We fully understand the practical importance of the question and a very powerful argument that can be made against the wisdom of the legislature, *but on that point we have nothing to say as it is not our concern.*"

In *Arizona Employers' Liability Cases*, 250 U. S. 400, this court upheld the Arizona employers' liability law as police regulation, as against the constitutional objections that it contravened the Fourteenth Amendment, deprived an employer of his property without due process of law, denied him equal protection of the law and interfered with the workman's constitutional rights of life, liberty and property.

In *Gilbert* v. *Minnesota*, 254 U. S. 325, this court upheld a statute of the state of Minnesota, making it a misdemeanor to discourage military service by public speech as within the police power of the state and as not transgressing the constitutional liberty of free speech, and in respect to the argument that defendant had a constitutional right to freedom of speech, said that it would be a travesty on the constitutional privilege he invokes to assign him its protection under the circumstances of this case.

In the Adamson law cases, *Wilson* v. *New*, 243 U. S. 332, the constitutionality of the Adamson Law fixing eight hours as a standard day for railway trainmen for the basis of pay, except on electric roads and on roads less than one hundred miles long, was upheld by this court as against the objections that:

(1) Congress had no power to legislate as to wages in transportation industries.

(2) That there was illegal discrimination in exempting roads operated by electricity, and short line railroads from the provisions of the act.

(3) That the eight-hour day regulation as a basis of pay was arbitrary.

The court held that the legislation was reasonable and desirable in the face of the emergency presented by the threat of a general strike.

Certainly, if the hours of labor in the mining industry can be regulated; if congress may fix an eight-hour day as a basis of pay in transportation industries; if it can compel solvent banks to pay the losses occasioned by the operation of insolvent banks; if it can forbid the keeping of billiard tables within the municipal limits; if it can compel universal vaccination against smallpox; if it can legislate concerning the hours a man or woman is permitted to work, surely the police power is ample to permit a state to so regulate the education of its children that they may speak the language of the country and that the citizenry of the state may be therefore improved. The Legislature of Nebraska should not be handicapped in its reasonable effort to prohibit a menace not only to the public welfare but to the safety of the state itself.

In the recent case of *Block* v. *Hirsh*, 256 U. S. 135, a rent law giving the tenant the right to occupy any hotel, apartment, or rental property, notwithstanding the expiration of his lease, so long as he paid the rent originally prescribed in the lease, was upheld by this court in the following language:

> "These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if, to answer one need, the legislature may limit height, to another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires

that. The reasons are of a different nature, but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."

The quotation on page sixteen of the brief of defendant, from *State* v. *Sperry*, 94 Neb. 785, holding that it is not within the police power of the state to prohibit the giving of trading stamps inasmuch as the legislature may not under the guise of protecting public interest arbitrarily interfere with private business, is particularly inapt in view of the decisions of this court. In the *Matter of Gregory*, 219 U. S. 216; *Rast* v. *Van Deman*, 240 U. S. 342; *Pitney* v. *State of Washington*, 240 U. S. 387, *and Tanner* v. *Little*, 240 U. S. 369, this court held that trading stamp enterprises are not within the protection of the Fourteenth Amendment and may be prohibited by the different states under their police power because the character of such enterprises may be deemed inimical to public welfare being of a somewhat similar nature to lotteries. In dealing with the questions the court said in the *Tanner case*, 240 U. S. 369:

> "Our present duty is to pass on the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature. *McLean* v. *Arkansas*, 211 U. S. 539. Such belief has many examples in state legislation and, we have seen, it has persisted against adverse judicial opinion. If it may be said to be a judgment from experience as against a judgment from speculation, certainly, from its generality it cannot be declared to be made in mere wantonness. *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204-205."

In view of this quotation this court will bear in mind the legislative enactments of twenty-one states in respect to for-

eign language legislation set forth on pages 24 to 29 of this brief.

In his quotation from the New York Independent, on page 17 of his brief, depicting the outraged feelings of the inhabitants of Alsace-Lorraine when German was forced upon them, and of the Poles when their language was prohibited in their own country, the defendant fails to appreciate the distinction between requiring those who seek asylum in America to use the language of the country and in attempting to impose a language by force of arms upon a conquered people in their own country. Of course, the latter is tyrannical just as the former is merely self protection.

III.

The Nebraska Statute does not unlawfully interfere with the defendant Meyer's occupation as a teacher.

It is urged that the right to pursue a legitimate vocation is within the rights guaranteed by the Fourteenth Amendment, that the teaching of German is a legitimate occupation and is likewise guaranteed (brief of plaintiff in error, pp. 7-9).

The liberty guaranteed to the individual by the Fourteenth Amendment is not the liberty enjoyed by primitive man. Personal liberty in the present stage of civilization is necessarily often subordinated to the public good. Doubtless defendant's occupation as a foreign language teacher is somewhat interfered with. The enactment of prohibitory legislation seriously handicapped many bar-tenders. Until the passage of regulatory statutes making it unlawful one could legally sell cigarettes to minors. Before the enactment of forgery statutes one could alter bank paper at his pleasure. But these rights were not guaranteed to the individual in perpetuity. With the enactment of the prohibition laws we all lost our right to transport and vend intoxicants. Prohibition laws do not violate the Fourteenth Amendment because they affect the property value of a brewery. *Mugler* v. *Kansas*, 123 U. S. 623. Regulatory legislation, upheld by our

courts has made all these things criminal. At one time the receipt of rebates led to the establishment of the greatest fortune in America, now their acceptance would lead to the penitentiary. One has no inalienable right to sell liquor or tobacco, receive rebates, run an automobile at high speed or carry a pistol. As society progresses and sets a higher standard many acts become unlawful which were previously legitimate. Defendant Meyer's occupation of a foreign language teacher was and still is a legitimate one. His method of livelihood is not seriously impaired by the Nebraska legislation. In the future he is confined in the exercise of his talents to children who have passed the eighth grade, just as tobacco dealers must confine their sales to persons who have attained their majority.

Prior to the female labor acts a woman could work as many hours as she desired, to the detriment of her health, but it has been held that a curtailment of her liberty to work was not a violation of the Fourteenth Amendment.

Wenham v. *State*, 65 Neb. 395.

Muller v. *Oregon*, 208 U. S. 412.

Ordinarily, conducting a laundry is a legitimate occupation, but the prohibition of laundry work within certain territorial limits in San Francisco between 10 A. M. and 6 P. M. was construed to be a police regulation not prohibited by the Fourteenth Amendment.

Barbier v. *Connolly*, 113 U. S. 27.

This case is so instructive on the question of discrimination that we set forth the following excerpts from it:

> "The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances

in the enjoyment of their personal and civil rights, that all persons should be entitled to pursue their happiness and acquire and enjoy property, that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts, that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances, that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

The right to choose or pursue a legitimate vocation is within the constitutional guarantee but the state has power within reasonable limits to determine what is and what is not a legitimate occupation and to determine when the same can be carried on.

Even as far back as the *Slaughter House Cases*, 16 Wall. 36, this court has held that while the butchering of animals was a legitimate occupation, yet the city of New Orleans under its police power could restrict the slaughtering of animals to certain buildings and places within the city limits. If the slaughtering of animals is so affected by the public interest as to permit its regulation by municipal authority, surely the early education of the citizens of a state is also sufficiently fraught with public interest to permit its regulation by the state in its own interest and for its own protection. It may be noted that the quotation from the slaughter house cases on page 8 of the brief of the plaintiff in error was from the dissenting opinion in that case and not from the judgment of the court, as was also the quotation from Mr. Justice Harlan in *Berea College* v. *Kentucky*, 211 U. S. 45; the actual holding in the Berea College case being that a statute prohibiting instructions to whites and negroes in the same incorporated school was not invalid.

The sweeping language used in *Allgeyer* v. *Louisiana*, 165 U. S. 578, and in *Adair* v. *United States*, 208 U. S. 161, quoted on pages 8 and 12 of defendant's brief, was modified and restricted by this court in *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549.

The McGuire case involved the validity of an Iowa statute granting a right of action to injured railway employees regardless of whether they had released the carrier from liability by contributing to or accepting the benefits of the carrier's relief insurance scheme.

In upholding the constitutionality of this statute as against the objection that it was against public policy, and that it interfered with the constitutional freedom of contract, and

after expressly referring to *Allgeyer* v. *La.*, 165 U. S. 578, and *Adair* v. *U. S.*, 208 U. S. 161, and in restricting the language used in those opinions, this court stated the principle in language that cannot be improved for logic and clarity of statement as follows:

> "But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community. *Crowley* v. *Christensen*, 137 U. S. p. 89; *Jacobson* v. *Massachusetts*, 197 U. S. p. 11. 'It is within the undoubted power of government to restrain some individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services or property.' *Frisbie* v. *United States*, 157 U. S. pp. 165, 166.
>
> "It it subject also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction. This limitation has had abundant illustration in a variety of circumstances. Thus, in addition to upholding the power of the state to require reasonable maximum charges for public service (*Munn* v. *Illinois*, 94 U. S. 113; *C. B. & Q. R. R. Co.* v. *Iowa*, 94 U. S. 155; *Railroad Commission Cases*, 116 U. S. 307; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19), and to prescribe

the hours of labor for those employed by the state or its municipalities. (*Atkin* v. *Kansas,* 191 U. S. 207), This court has sustained the validity of state legislation in prohibiting the manufacture and sale of intoxicating liquors within the state (*Mugler* v. *Kansas,* 123 U. S. 623; *Crowley* v. *Christensen, supra*); in limiting employment in underground mines or workings, and in smelters and other institutions for the reduction or refining of ores or metals, to eight hours a day except in cases of emergency (*Holden* v. *Hardy,* 169 U. S. 366); in prohibiting the sale of cigarettes without license (*Gundling* v. *Chicago,* 177 U. S. 183); in requiring the redemption in cash of store orders or other evidence of indebtedness issued in payment of wages (*Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13); in prohibiting contracts for options to sell or buy grain or other commodity at a future time (*Booth* v. *Illinois,* 184 U. S. 425); in prohibiting the employment of women in laundries more than ten hours a day (*Muller* v. *Oregon,* 208 U. S. 412); and in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal, instead of the weight of the coal as originally produced in the mine (*McLean* v. *Arkansas,* 211 U. S. 539).

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

"The principle was thus stated in *McLean* v. *Arkansas*, 211 U. S. 547, 548: 'The legislature being familiar with local conditions, is primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. (Cases cited.) * * * *If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained;* if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

The case holds that in dealing with the relation of employer and employee, that the state legislature necessarily had a wide field of discretion in order to protect the health and safety of workmen, to promote peace and good order, and to insure wholesome conditions of work and freedom from oppression and that the granting of a right of action to injured employees regardless of whether or not they had involved themselves in the carrier's "relief plan" was within the reasonable discretion of the Iowa legislature and was not contrary to the federal constitution.

Surely if the state may legislate to protect its workmen, it may also legislate in respect to the education of the children in such a way as to insure a high standard of citizenry and a more intelligent basis and foundation for the state government.

IV.

The Nebraska Foreign Language Statute (Siman Law) does not deny defendant the equal protection of the law.

It is urged as a technical and perhaps a theoretical objection to the Nebraska law that it permits private tutors to

nstruct children in foreign languages while it prohibits such nstruction in schools of children who have not passed the ighth grade and have not previously mastered English.

The Supreme Court of Nebraska, in *Nebraska District Evangelical Lutheran Synod* v. *McKelvie, the Governor,* 187 N. W. 927, disposes of this objection in a practical as well as a sound manner in the following language:

> "It is claimed that the law is discriminative. It applies, however, to all schools generally. It covers all of the schools, where, it is well known, children now receive their education. It operates equally upon all children who have not had an eighth grade education and a knowledge of English which will be consequent therefrom. *Private instruction by a hired tutor, whether within or without the scope of the law, is instruction which is negligible in its extent.* In either event, the law operates in that matter without discrimination. The use and resulting knowledge of a foreign language in the home is not restricted, nor is instruction there prohibited. The exception of Sabbath schools from the law has been placed there with the evident purpose of preventing interference with religious exercises. It is not essential to the validity of the law that it should be a complete and absolute prohibition against the teaching of foreign languages. It was not intended to be such. The law is a regulation of such teaching, and not a prohibition. The qualifications made are not without reasonable basis, and cannot be said to be purely arbitrary."

The condition for which remedy was sought by the Nebraska legislation arose from the teaching of foreign languages to young children in parochial schools before such children had mastered English. The result of teaching German as the mother tongue to a lad born in America proved to be bad. The legislature guarded against it in the statute which it enacted under the police power. The fact that it did not declare the teaching of foreign languages by tutors or parents unlawful does not constitute an unreasonable, unlawful classification.

The Supreme Court of the United States in many cases has held that a legislature was vested with considerable discretion in classifying occupations to which regulatory legislation could be applied.

In *Miller* v. *Wilson,* 236 U. S. 373, the following language was used by Mr. Justice Hughes in passing upon alleged discrimination in female labor legislation:

> "We are thus brought to the objections to the act which are urged upon the ground of unreasonable discrimination. These are (1) the exception of women employed in 'harvesting, curing, canning or drying of any variety of perishable fruit or vegetable,' (2) the omission of those employed in boarding houses, lodging houses, etc., (3) the omission of several classes of women employes, as for example stenographers, clerks and assistants employed by the professional classes, and domestic servants, and (4) that the classification is based on the nature of the employer's business and not upon the character of the employe's work.
>
> "With respect to the last of these objections, it is sufficient to say that the character of the work may largely depend upon the nature and incidents of the business in connection with which the work is done. The legislature is not debarred from classifying according to general conditions; otherwise, there could be no legislative power to classify. *For it is always possibble by analysis to discover inequalities as to some persons or things embraced within any specified class.* A classification based simply on a general description of work would almost certainly bring within the class a host of individual instances exhibiting very wide differences; it is impossible to deny to the legislature the authority to take account of these differences and to do this according to practical groupings in which, while certain individual distinctions may still exist, the group selected will as a whole fairly present a class in itself. Frequently such groupings may be made with respect to the general nature of the business in which the work is performed; and, where a distinction based on the nature of the business is not an unreasonable one considered in its general

application, the classification is not to be condemned. (See *Louisville & Nashville R. R.* v. *Melton,* 218 U. S. 36, 53, 54.) * * * The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulations, to extend it to all cases which it might possibly reach. *Dealing with practical exigencies, the legislature may be guided by experience. Patzone* v. *Pennsylvania,* 232 U. S. 138, 144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.' *Caroll* v. *Greenwich Insurance Co.,* 199 U. S. 401, 411. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224, 227."

In *Lindsey* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, the court said:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.

"2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

"3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

> "4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Batchel* v. *Wilson,* 204 U. S. 36, and other cases."

See *Johnston* v. *Kennecott Copper Corp.,* 248 Fed. 407, (Circuit Court of Appeals, Ninth Circuit) upholding legislation in respect to mining concerns employing five or more persons as against the charge that this was unlawful discrimination and classification.

De minimis non curat lex. Instruction by private tutors in Nebraska was too inconsequential for the legislature to concern itself with.

In *Halter* v. *Nebraska,* 205 U. S. 34, Nebraska legislation prohibited the printing of any advertisement upon the American flag and the use of the flag as an advertising medium was sustained. Many excellent expressions illustrative of the police power are used in the decision. One of the arguments against the validity of the legislation was that the statute expressly permitted the use of the flag on magazines. The court disposed of this objection in a summary manner, holding there was no illegal discrimination and no unlawful classification and that the exemption of magazines from the general prohibition against promiscuous use of the flag for advertising purposes rested upon reasonable grounds.

In *Quong Wong* v. *Kirkendall,* 223 U. S. 59, a law imposing a tax on hand laundries not employing women was upheld as against the argument that it was intended as an unlawful discrimination against Chinese laundries.

In discussing the legislative power of the state this court said at page 62:

> "It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary, as was illustrated in *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *Williams* v. *Fears,* 179

U. S. 270; *W. W. Cargill Co.* v. *Minnesota,* 180 U. S. 452, 469. * * * The criminal law is a whole body of policy on which states may and do differ."

And the case further held that a state may carry out a policy with the wisdom of which this court may disagree.

Other cases holding that a state may exercise reasonable discretion in classifying occupations which are regulated or prohibited, are

Wilson v. *New,* 243 U. S. 332.
Pitney v. *Washington,* 240 U. S. 387.
Tanner v. *Little,* 240 U. S. 369.
McLean v. *Arkansas,* 211 U. S. 539.
Lower Vein Coal Co. v. *Industrial Board of Indiana,* 255 U. S. 144.

CONCLUSION.

The evidence shows that this defendant Meyer never attempted to comply with the spirit of the Nebraska foreign language law, but like a moth with the candle, flitted as near as he thought he could without getting burned. The court left to the jury the question of whether or not the shortening of school hours and the extension of the noon recess from 1 o'clock to 1:30 in the afternoon to permit instruction in German was a subterfuge to evade the penalty of the law for teaching German to immature children. By its verdict the jury declared it was. This finding of fact will not be overturned in this court. The jury were justified in believing that the shortening of the school hours, the lengthening of the recess from 1 to 1:30, and the teaching of German in the period from 1 to 1:30, was a subterfuge to evade the law. The school hours remained practically the same, the half-hour previously devoted to the legitimate work of the school was taken out and devoted to instruction in German. Such action is both humorous and exasperating. Had the Supreme Court of Nebraska reversed this conviction there would be no legal obstacle to recesses of two and three hours

during regular school hours devoted to instruction in Germa
The whole purpose and intent of the foreign language la
would thus be nullified.

Perhaps we have given this case more attention than i
merits, as the only amount involved is a twenty-five dolla
fine. Yet we feel this language legislation is so importan
at least to the state of Nebraska, that we desire by all legiti
mate arguments, to protect the Siman law from adverse judi
cial comment, even though the Siman law itself has bee
repealed.

This defendant Meyer has attempted to evade a crimina
statute by subterfuge. He should be taught that our law
are to be obeyed and that one who seeks to evade them doe
so at his peril.

The Nebraska foreign language legislation cannot justly b
criticized as arbitrary or strong-arm Americanization. Th
war is over and our martial feelings have subsided, yet w
should not forget the lessons we learned when the safety
of the nation hung in the balance. That conflict taught u
that we must have a united people, united in ideals, languag
and patriotism. This statute is not an unreasonable or arbi
trary restraint on anybody. It is only considered so by a few
citizens of German descent. It is simply the exercise by th
state of the right of the state to so supervise the educatio
of its youth that in Nebraska at least the language of th
country shall be the language of the heart.

Respectfully submitted,

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Of Counsel.
Dated Lincoln, Nebraska,
November 20, 1922.